

IN THE MATTER OF LICENSE NO. 314870 MERCHANT MARINER'S DOCUMENT
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Nels MONSEN Z-52764-R

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1816

Nels MONSEN

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 6 September 1968, an Examiner of the United States Coast Guard at New York, N. Y., suspended Appellant's seaman's documents for six months on twelve months' probation upon finding him guilty of misconduct and negligence. The specifications found proved allege that while serving as master on board MV MYSTIC SUN under authority of the document and license above captioned, on or about 17 March 1967, Appellant

(I) was Negligent in that he:

- (1) failed to keep out of the way of a privileged vessel in a crossing situation;
- (2) crossed ahead of a privileged vessel in a crossing situation; and
- (3) failed to slacken speed, stop, or reverse to avoid collision with a privileged vessel in a crossing situation; and
- (4) failed to maintain a proper lookout; and

(II) committed an act of Misconduct by sounding a "cross-signal" in a crossing situation by answering a one-blast signal by a privileged vessel with a two-blast signal.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence many documents, and the testimony of the mate of SAMUEL H. HERRON and the quartermaster of MYSTIC SUN.

In defense, Appellant offered in evidence many documents, his own testimony and, on recall, the testimony of the quartermaster of MYSTIC SUN and the mate of HERRON.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charges and specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of six months on twelve months' probation.

The entire decision was served on 11 September 1968. Appeal was timely filed on 4 October 1968. Appeal was perfected on 17 April 1969.

FINDINGS OF FACT

On 17 March 1967, Appellant was serving as master on board MV MYSTIC SUN and acting under authority of his license and document.

On that date, at 0550, MYSTIC SUN was involved in a collision with MV SAMUEL H. HERRON in a stretch of the east River, New York west of the Whitestone Bridge.

In view of the disposition of this case, further findings of fact are unnecessary.

BASES OF APPEAL

This Appeal has been taken from the order imposed by the Examiner. By reason of the disposition to be made, the Bases of appeal need not be set out as propounded.

APPEARANCE: MENDES & MOUNT, of New York, N. Y., by Frank J. Maley and Alfred a. Lohne, Esq., of counsel.

OPINION

The findings in this case are, in the main, unacceptable. Some findings are inconsistent with others. Some significant and necessary findings are omitted. Some findings are not credible.

As to the primary issues involved, certain "findings of Fact" are quoted verbatim before comment:

"10. When Buoy #4 was abeam to port, about 0520, 17 March 1967, the course of the M.V. MYSTIC SUN was set as 080° T. Her speed at this time was 3 Kts. over the ground.

"11. Some 20 minutes after passing Buoy #4 abeam the person charged sighted the Tank Vessel Samuel H. Herron coming under

the Whitestone Bridge about 1 mile distant and bearing 3° on starboard bow. This bearing broadens to about 40° starboard bow in the next five minutes as the M.V. MYSTIC SUN heads across the East River originally for the purpose of anchoring between Clason Point and the stake boat at the entrance to Westchester Creek. It was at 0540 while preparing to cross East River that Captain Monsen saw the Tank Vessel Samuel H. Herron about 3° on his starboard bow a mile or so distant as it was passing under the Whitestone Bridge, at which time the M.V. MYSTIC SUN was about 300 yards distant and bearing 300°T from College Point Reef.

"12. Shortly thereafter, The Tank Vessel Samuel H. Herron sounded a one blast signal. The one blast signal by a privileged vessel in a crossing situation indicates that the privileged vessel intends to hold her course and speed.

"13. About 1/2 minute later the M.V. MYSTIC SUN sounded a two blast signal. The two blast signal by a burden vessel in a crossing situation is a proposal that the burdened vessel cross the bow of the privileged vessel. At this time the Tank Vessel Samuel H. Herron was about 40° on the starboard bow of the M.V. MYSTIC SUN and reciprocally the SUN was about 40° on the port bow of the Herron. (these bearings are relative.) Distance between the vessels had closed to about one-half mile.

"14. Almost immediately the Tank Vessel Samuel H. Herron gave the danger signal. The distance between the vessels had closed to about one-quarter of a mile.

"15. With the distance between the vessels closing and the relative bearings remaining about the same, the M.V. MYSTIC SUN put her wheel hard left. The Tank vessel Samuel H. Herron being buffeted by the Northeast wind was carrying right wheel in her effort to hug the north shore. Both vessels were heading for the immediate area of Clason Point.

"16. The Tank Vessel Samuel H. Herron was on full ahead from the time she had passed Whitestone Bridge up until the sounding of the danger signal, which was about three or four minutes before collision, at which time her speed was reduced but not down to "Dead Slow" because of the wind. (The record does not state to what speed it was reduced, because the witness could not say; however, he opined it was "mid-speed".)

"17. M.V. MYSTIC SUN was on regular full ahead from about the time the vessel had negotiated Hell Gate until the crossing situation developed at which speed was cut to one-third ahead.

"18. While the Tank Vessel Samuel H. Herron, which has a magnetic compass; was on heading WNW (carrying right rudder because of the wind) its port quarter came into contact with the starboard quarter of the M. V. MYSTIC SUN which had been on hard left rudder for about three minutes before collision, about the time the Tank Vessel Samuel H. Herron sounded the danger signal. This vessel was still swinging to her "hard left" rudder at collision. After collision the vessel was aground off Clason Point on heading 355°. Time of collision was 0550, 17 March 1967.

"19. The Tank Vessel Samuel H. herron continued up the starboard side of the M. V. MYSTIC SUN, passing between this vessel and Clason Point. The Tank Vessel Samuel H. Herron crossed in front of the M. V. MYSTIC SUN then around to the left to about the entrance to the Bronx River then came back and spoke to the M. V. MYSTIC SUN."

The Examiner's "Opinion" also contains findings of fact, some of which are quoted. With respect to the position of MYSTIC SUN at 0520 (Finding No. 10), the Examiner said, "I am, however, satisfied from all of the evidence that he was on the southerly side of the center line of the East River at this time.

Another important "finding" in the "Opinion" is this: "As the M.V. MYSTIC SUN headed across East River towards Clason Point area, Captain Monsen observed the Tank Vessel Samuel H. Herron coming under Whitestone Bridge about 3° on his starboard bow." D-11.

A third such "finding" is this: "When the Herron was about 40° or so on the SUN's starboard bow about three quarters of a mile away, the Herron had the SUN about 40° or so (relative) on her port bow." D-11

A fourth such "finding" is: "At about the time of the danger signal, Captain Monsen put his rudder hard left. Mr. Stillwagon was continuing to steer to his right. Both vessels were in the immediate vicinity of each other. As the 'Herron' passes the 'SUN' she was on a WNW (magnetic) heading. The 'SUN' was still answering 'hard left'. The starboard quarter of the 'SUN' and the port quarter of the 'Herron' were brought into contact." D-13

II

In his "Opinion," the Examiner makes statements which are truly opinion:

- (1) "I rejected the testimony of both Captain Monsen and Mr. Driver that the vessel was on course 080° when she had

the Herron 40° on her starboard bow about three-quarters of a mile away because by plotting this position the Herron is well ashore on Tallman Island," D-11;

- (2) "I reject the testimony of Captian Monsen which attempted to give the impression that the Tank Vessel Samuel H. Herron followed' the M.V. MYSTIC SUN across the East River from the South Side to the North Side. there is no creditable evidence that puts the Tank Vessel Samuel H. Herron on the South side of the center line of the East River. . ."

III

At this point it must first be noted that if a finding, imbedded in an opinion" contradicts or is inconsistent with an express finding of fact, the latter must control.

Second, it is noted that rejection of evidence as to a certain point does not establish the truth of the opposite, or of anything else. Decision on Appeal No. 894. In this connection, it may be mentioned that while the Examiner rejects the testimony of appellant that MYSTIC SUN was on a heading of 080°t when HERRON was three quarters of a mile distant the Examiner makes no finding of fact as to anything when the vessels were three quarters of a mile apart, except in his Opinion. His findings pertaining to distance specify "a mile or so" (No. 11), "one-half mile" (No. 13) and "one-quarter of a mile" (No. 14). The effect of the rejection here, even in the absence of a finding as to when the vessel's were three quarters of a mile apart seems to me to produce the results that while MYSTIC SUN was not on 080° when the vessels were that distance apart the bearing of HERRON was in fact forty degrees on MYSTIC SUN's starboard bow. This is confirmed by the "finding" in the "Opinion."

Third, it is noted that "opinion," even if couched in language of "findings," is no substitute for findings of fact." While "findings of fact" may validly be inferred from evidence upon which "opinion" may operate, the findings should be made.

IV

There is no need to examine the discrepancy between the findings of fact here which allow belief that MYSTIC SUN was on 080°t when HERRON was first sighted three degrees on the starboard bow, with MYSTIC SUN "preparing to cross East River," and the "Opinion" statement that MYSTIC SUN was headed across East

River...when [Appellant] observed HERRON .. . about 3° on his starboard bow."

The cardinal fact is that HERRON was found to have been on WNW magnetic, at the time of collision. (This requires addition of "Opinion" to "Findings of Fact", HERRON was therefore found to have been on a heading of about 279°t - 280°t. If the vessels collided port quarter of HERRON to starboard quarter of MYSTIC SUN, MUSTIC SUN's heading could not have been anything to the right of 270°t.

The only evidence as to the angle of impact was provided by the mate of HERRON. The Examiner's finding is not the result of misunderstanding by the Examiner of the testimony nor the result of a typographical error. The testimony's of HERRON's mate as to the angle of impact was unequivocal.

The angle of impact found, with HERRON on a heading of 279-280°t, is impossible. There is not a shred of evidence to justify a finding that MYSTIC SUN had somehow reached a heading of 270° or less before the collision.

This impossibility is further proved by the fact that the Examiner found that MYSTIC SUN was, not long after collision and before HERRON had passed it, aground on a heading of 355°t.

With MYSTIC SUN on hard left rudder for three minutes before collision, and at the time of collision, there are only two ways in which MYSTIC SUN could have grounded on that heading. One is that it continued left on hard rudder through about 270°. The other is that MYSTIC SUN immediately came hard right after the collision with such instant effect that it turned ninety degrees or more to the right before HERRON had passed it.

Both possibilities are untenable as explanations. The finding that after collision HERRON continued along the starboard side of MYSTIC SUN and then crossed ahead of its bow after it had grounded preclude acceptance that MYSTIC SUN had continued left for 270°t, because then it would have passed astern of HERRON. It also precludes belief in the alternative that MYSTIC SUN had suddenly come right, because the angle of impact found has the vessels diverging in heading at the time of collision, while the findings would require belief that HERRON had merely "continued" on the starboard side of MYSTIC SUN and crossed ahead of it after MYSTIC SUN was on 355°t.

The finding that HERRON was on WNW (magnetic) at the moment of impact is not justified by the evidence. The testimony of the mate of HERRON was always to the effect that either he did not know what his heading was at any given moment or that he never looked at his

compass.

VI

Three major defects in this record may be noted here. One is, as pointed out just above, that the mate of HERRON did not testify ever as to his heading at any given moment. The significance of this is doubled by the fact that the Examiner stated in his "Opinion," part of which has already been quoted,:

"there is no creditable evidence that puts the Tank Vessel Samuel H. Herron on the Southside of the center line of the East RiverI cannot appreciate how the Tank Vessel Samuel H. Herron which was being buffeted by the NE wind and drawing so little water 6'6" aft. would come near the South or leeshore, where he would be in danger of being blown ashore."

The fact is that the Examiner's findings already allow that when MYSTIC SUN, on 080°t and on its own right hand side of the river, first sighted HERRON, HERRON was three degrees on its starboard bow a mile or so away. This places HERRON on its left side of the river. The fact that HERRON would be struggling to keep to its right is not persuasive that it was to its own right. HERRON was light, and was found to have a draft or zero at the bow. Since the Examiner has left this matter to a question of opinion, it is as likely that the light HERRON, buffeted by strong winds from its starboard side, had been driven to its left as it was that HERRON was on its own right because that is where the mate would have wanted it to be.

This speculation is not a substitute for an analysis of the substantial evidence so as to arrive at a different set of findings from the Examiner's. The Examiner made no findings as to course, speed, or position of HERRON at any time prior to the collision.

The failure to make findings as to position, course, or speed of HERRON renders this collision indecipherable.

It seems obvious that if the heading of HERRON was at any time WNW (magnetic), its course, considering the light condition of the vessel and its mate's continued use of the right rudder to off set the wind, cannot be guessed at. A proper record might have authorized an examiner to make such a finding. The Examiner here did not make such a finding. The initial decision here leaves open the possibility that HERRON had several times crossed the East River, and the record of proceedings does not authorize a firm finding.

It must also be noted that this collision occurred at a time

when vessels should have been showing lights. The aspect of lights is of utmost importance in finding how a collision occurred. Not one question was asked as to the lights seen by one vessel from the other at any time.

VII

When the findings are placed in order, another difficulty appears.

A time of 0540 is fixed as the time of first sighting, at a distance of one mile. Finding No. 11, The situation of Finding No. 12 occurs "shortly thereafter," and that at No. 13 occurs about "1/2 minute" after that of twelve. When vessels are approaching each other, "shortly thereafter" plus "one half minute" must add up to less than one minute. Thus by 0541 the vessels are one half mile apart and each is forty degrees on the bow of the other.

But the finding in the "Opinion" has each vessel forty degrees on the bow of the other when they were three quarters of a mile apart.

It is observed that the relative speed implied by these findings is about thirty knots.

Finding No. 14 occurs "almost immediately" after the facts of No. 13, but the vessels are only a quarter of a mile apart.

Finding No. 15 has the vessels with relative bearing unchanged, with MYSTIC SUN coming hard left, when HERRON blew a danger signal. Finding No. 16 places the danger signal at "three or four minutes before collision". Since the collision was found to have occurred at 0550, this places the hard left rudder of MYSTIC SUN at 0546 or 0547.

The vessels had thus closed for one half mile with relative bearings unchanging. But then, MYSTIC SUN, presumably (from Finding No. 17), reduced from "full", about six knots, to "one-third," speed not ascertained, and came hard left, tending further to reduce speed. Simultaneously HERRON reduced from "full ahead," to "not down to 'Dead Slow'", neither speed ascertained in knots. All three actions would contribute to breaking up of the "collision course" situation which had existed for at least five and possibly six minutes.

With evasive actions and maneuvers being taken for a period of time at least equal to one half the time that the collision situation (unchanging relative bearings) had existed, and possibly for almost an equal time, it is difficult to see how the collision

could have occurred.

VIII

There is no doubt that the collision occurred. There is also no doubt that Appellant did not adequately explain it so as to exonerate himself. But under the circumstances he had no duty or burden to do so.

There is no substantial evidence to support the Examiner's findings as made, and the findings as made do not explain the collision. No rejection of Appellant's attempted explanation elevates the case against him to one found proved on substantial evidence.

The struggle to explain the collision in a manner adverse to Appellant does not succeed since the inadequate findings could not be amplified because of the inadequacy of the record presented. There is, moreover, another fundamental fault.

IX

Of course, a vessel may legitimately move from the right side of a channel to the left side, under certain conditions, so as to create a "special circumstance," such that the "crossing rules" would not be automatically applicable. But a specification alleging violation of the "narrow channel rule" was dismissed.

When a vessel which has been found to have been on its own right hand side of a narrow channel elects to cross the channel in the presence of a vessel coming from the opposite direction, collides with the other vessel on its own "wrong" side of the channel, and ground on the "wrong" edge of the channel, there seems to be a case of "res ipsa loquitur." But normally I do not think that a vessel violating the narrow channel rule in the presence of an oncoming vessel should be found to have avoided responsibility for obedience to the rule and to have rendered itself subject only to the crossing rule.

This is mentioned only because, in the instant case, the dismissal of a specification which alleged a clear violation of the rule, on a record which clearly proved a violation of the narrow channel rule, required gymnastic handling of a record which could support little else in the way of establishing a collision.

X

The next matter to be discussed is the finding that Appellant was guilty of misconduct in sounding a "cross signal." The

findings are clear, and are supported by the record, that HERRON sounded one blast before MYSTIC SUN's sounded two.

The Investigating Officer, in support of his argument that MYSTIC SUN lacked a proper lookout, argued strongly that no one on MYSTIC SUN heard the one blast from HERRON. While the Examiner found that MYSTIC SUN lacked a proper lookout, he neither accepted nor rejected the argument, but he made no finding as to whether HERRON's one blast signal had been heard by Appellant before he sounded his two blast proposal.

33 CFR 80.2 is, I think, designed to prohibit deliberate "cross signals." A mechanical finding that because signal "X" was made before signal "Y", signal "Y" becomes a cross signal, could hurt the innocent as well as the negligent.

To take an extreme case, if at a distance of over two miles a burdened vessel decided to propose a crossing contrary to the rules and sounded a two blast signal, and if nine seconds later, the privileged vessel decided to announce its intention to hold course and speed, its signal, following one that had not yet been heard, would be a "cross signal."

Absent a finding that Appellant had heard a one blast signal from HERRON, and faced with the Investigating Officer's argument that no one on MYSTIC SUN had heard the blast signal of HERRON, I cannot support a finding that Appellant violated 33 CFR 80.2.

XI

One thing only remains. A specification alleging failure to maintain a proper lookout was found proved even after a specific rejection of the allegation that this failure contributed to the collision. It does not appear profitable to enter upon the exploration of whether the specification as found proved, without other apparent evidence of negligence, should be affirmed. The survey and resume' of earlier Decisions on Appeal and of court decisions which would be needed to affirm would be a waste of time. If the voluminous record compiled here, over a period of more than two years from the date of a casualty which produced only insignificant property damage, can support no more than that Appellant failed to have a proper lookout, which failure did not contribute to the collision, with all of the basic specifications insupportable upon the record, the entire set of charges might as well be dismissed.

CONCLUSION

The charges and specifications should be dismissed.

ORDER

The order of the Examiner dated at New York, N. y., on 6 September 1968 is VACATED, and the charges are DISMISSED.

C. R. BENDER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 2nd day of September 1970.

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